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AUG 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM R. JANOWSKI, ET AL.,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL NO. 710 PENSION FUND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The Petition herein arises from the same judgment as No. 82-151, a Petition for Certiorari filed by the present respondents (the defendants in this action)—International Brotherhood of Teamsters Local No. 710 Pension Fund (sometimes referred to as "the Fund" or "the Plan") and its Trustees.

The claims in the Complaint and the prior proceedings are more fully described at pp. 3-8 of the Petition in No. 82-151. The questions raised by that Petition are, however, entirely distinct from those raised by plaintiffs' present Petition (No. 82-37) which focuses on two provisions of the Plan whose legality was sustained by the Court of Appeals.[1] Those provisions were adopted as part

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[1] One of the issues in No. 82-151 is whether the plaintiffs' challenge to a different plan provision (which the court below struck down) is justiciable. We do not concede the justiciability of the

of a series of amendments to the Plan made by the Trustees in 1976 to comply with the Employee Retirement Income Security Act of 1974, 88 Stat. 891 (ERISA). These amendments were submitted to and approved by the Internal Revenue Service. (*See* Pet. 28a).[2]

§ 1.16 of the amended Plan provides in full: " 'Normal Retirement Age' shall mean age sixty-five (65), or if later, the age of the Participant on the tenth (10) anniversary of his participation." (A. 158) Prior to ERISA the Plan had defined the 57th birthday as the "normal retirement date" and age 57 as the "normal retirement age." (A. 108, 110). As amended, the Plan provides the same benefits to pre-ERISA participants who retire at age 57, which is now defined as the "regular retirement age." (Section 1.18, A. 158). Both courts below held that the definition in § 1.16 is valid and is to be treated as the "normal retirement age" for purposes of the vesting provisions of ERISA, in accordance with the statutory definition, 29 U.S.C. § 1002(24), 26 U.S.C. § 411(a)(8). *See* Pet. 2a-4a, 27a-31a.

The other provision which is challenged in No. 82-37 is § 3.10 of the Plan (A. 161-162), which determines the "method for computing accrued benefits during pre-ERISA years." (*See* Pet. 31a.) The particular terms of the present plan's accrual formula do not appear to be pertinent, but for completeness the provision is set forth as an Appendix to this Brief. What is material is that, as the Court of Appeals said, "[i]t is undisputed that the prior Plan did not specify a formula." (Pet. 32a, see also Pet. 4a.) The District Court nevertheless implied an accrual formula for pre-ERISA service because the pre-ERISA plan "did provide for specific benefits to persons retiring

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claims which are involved in No. 82-37, but do not discuss the point in this Brief because review is unwarranted even on the Court of Appeals' premise that these claims are justiciable.

[2] "Pet." refers to the Petition for Certiorari in No. 82-37. "A." will refer to the Appendix of Defendants-Appellants in the Court of Appeals.

at age 57 after 20 years of qualified service." (Pet. 4a.)[3] The Court of Appeals "reject[ed] the concept of implied accrual of benefits, for had Congress intended that a formula based on required years of service be implied whenever a plan did not specify one, subsection (ii) [of 29 U.S.C. § 1054(b)(1)(D)] would be superfluous." (Pet. 32a.)

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Satisfy The Standards Of Rule 17

Rule 21.1(j) of this Court provides that a petition for certiorari shall contain a "direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17". But the Argument of the present Petition is in defiance of, rather than compliance with, the standards delineated in Rule 17. No conflict is asserted between the decision below and any decisions of this Court or of any other court. No assertion is made that the court below has departed from the accepted and usual course of judicial proceedings or sanctioned such a departure. Nor is it asserted in the argument that either of the questions tendered by the Petition is of such importance that it should be settled by this Court. Instead, the argument consists of a tendentious statement of petitioners' view of the merits, combined with repeated characterization of the decision below as "erroneous" or "clearly erroneous" (Pet. 10, 11, 12, 14, 17, 18)—as if this were a Court of Errors.

The closest that petitioners come to addressing the grounds for discretionary review as set forth in Rule 17 is a single paragraph under the heading "JURISDICTION" (Pet. 2). The importance of the questions pre-

[3] The District Court ruled that "Section 3.10 . . . is inconsistent with the requirements of 29 U.S.C. § 1054(b)(1)(D) and must be reformed to provide for the accrual of benefits at the rate of $22.50 for each year of credited service prior to February 1, 1976, subject to a maximum of $450.00." (Pet. 10a).

sented is there claimed, but certainly not demonstrated. Given the vast number of private pension plans covered by ERISA, this Court obviously cannot review a Court of Appeals' decision whenever it involves "issues of first impression involving the proper interpretation of" that complex enactment (*id.*).

The "questions presented for review" identify no statutory issue, but are confined to whether "the Trustees of Teamsters Local No. 710 Pension Plan can" lawfully do what petitioners say they have done (Pet. i).[4]

The statement that the decision below "directly affects the benefits of approximately 15,302 participants in" (*id.*) respondent Fund is true, but (like the first question presented, Pet. i) it is misleading insofar as it conveys the impression that all or even a majority of these participants are *adversely* affected by that decision. Plainly, since the assets of the Fund are finite, the eligibility and benefit provisions of the plan which the Court of Appeals approved favor some participants and disfavor others.

Petitioners also attempt to magnify the importance of the decision below by saying that other plans may be affected thereby, though without indicating how many plans have provisions similar to those which they challenge. We cannot say that there are none, since it is reasonable to assume that trustees of other plans, advised by their attorneys and actuaries, made similar adjustments to comply with the requirements of the new law. The circumstance that the resulting plans were—as they were required to be—approved by the Internal Revenue

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[4] Moreover, neither question accurately describes even this case. As to the first question, the major misstatement is that it omits the real basis of the decision below—that the Trustees in revising the plan properly determined 65 to be the "normal retirement age," in accordance with the statutory definition. As to the second question, the Trustees have not "ignore[d] benefits payable under the terms of the pre-ERISA plan * * *"; they have only refused to attribute to that plan a nonexistent accrual formula.

Service would support the legality of the provisions challenged herein. And the Court of Appeals' action in confirming their legality does not even remotely justify further consideration by this Court.

II. The Decision Below Is Correct

For the reasons just stated, review of the decision below would not be warranted even if petitioners' claims of error were well taken. But when one cuts through the fog created by petitioners' semantic quibbles[5] to the statutory provisions whose meaning is at issue, the Court of Appeals' decision is easily seen to be correct.

A. Both 29 U.S.C. § 1002(24) and 26 U.S.C. § 411(a)(8) define "normal retirement age" as

> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

That definition triggers the minimum vesting standards of 29 U.S.C. § 1053 and 26 U.S.C. § 411. Section 1.16 of the respondents' plan expressly defines age 65 as the "normal retirement age" under the plan. On its face, this definition clearly permits pension plans to determine what the "normal retirement age" shall be, as long as that age satisfies the standards set forth in subparagraph (B), as this plan concededly does. Nevertheless, petitioners argue that the court below erred in holding that the "normal retirement age" under the plan is 65—as is provided therein—rather than 57, which was designated

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[5] Cf. U.S. Sup. Ct. Rule 21.5:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

as the "normal retirement age" in one paragraph of the pre-ERISA plan. This contention lacks merit.

There is simply nothing in ERISA which deprives trustees of the authority to designate 65 as the "normal retirement age" merely because their plan happened to use that term for some earlier age in the pre-ERISA plan before ERISA gave it a new technical meaning. As the Court of Appeals reasoned:

> Initially, we note that [26 U.S.C.] § 411(a)(8) has not yet been judicially interpreted. Therefore, in construing the section we are guided by the plain meaning of the language, *Atchison, T. & S.F. Ry. Co. v. United States*, 617 F.2d 485 (7th Cir. 1980), as well as Congressional intent. The legislative history to § 411(a)(8) indicates that in fashioning minimal requirements for private pension funds, Congress intended to increase the number of individuals participating in retirement plans, H.R. No. 93-807, 93rd Cong., 2d Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4671, while at the same time promoting the financial integrity of those plans. H.R. No. 93-533, 93rd Cong. 1st Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4652. Analyzing § 411(a)(8) in this light, it is clear that Congress intended the trustees, as fiduciaries, to balance desired benefits against economic realities. For this reason, the statute authorized any normal retirement age subject to the limitations of 65 years or 10 years of service. Under § 411(a)(8) the trustees certainly could have established a normal retirement age of less than 65; the statutory language, however, in no way requires them to do so.
>
> *Congress was aware that ERISA would require private pension funds to be substantially amended to conform to ERISA. Had it intended the normal retirement age to be the same age as that under the prior Plan it undoubtedly would have so provided.* Obviously, the required amendments were costly and Congress wisely committed the task of balancing eligibility standards and benefit levels against the abil-

ity of the plans to pay. We agree that age 65 was permissibly chosen as the normal retirement age under the new Plan. [Pet. 29a-30a, emphasis added] [6]

The Court of Appeals' conclusion is confirmed, as the District Court expressly recognized (Pet. 3a), by Department of Treasury Regulation 26 C.F.R. § 1.411(a)-7(b). Subparagraph 7(b)(1) sets forth the "general rule" for determining the "normal retirement age" under 26 U.S.C. § 411 and regulations thereunder; it is reproduced in full in the margin.[7]

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[6] Petitioners seize on an apparent misstatement of their contention below (Pet. 13). "This Court, however, reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297. And, as shown above, the Court of Appeals' analysis of the merits addressed and rejected petitioners' actual position.

[7] (b) *Normal retirement age*—(1) *General rule.* For the purposes of section 411 and the regulations thereunder, the term "normal retirement age" means the earlier of—

(i) The time specified by a plan at which a plan participant attains normal retirement age, or

(ii) The later of—

(A) The time the plan participant attains age 65, or

(B) The 10th anniversary of the date the plan participant commences participation in the plan.

If a plan, or the employer sponsoring the plan, imposes a requirement that an employee retire upon reaching a certain age, the normal retirement age may not exceed that mandatory retirement age. The preceding sentence will apply if the employer consistently enforces a mandatory retirement age rule, whether or not set forth in the plan or any related document. For purposes of subdivision (i) of this subparagraph, if an age is not specified by a plan as the normal retirement age then the normal retirement age under the plan is the earliest age beyond which the participant's benefits under the plan are not greater solely on account of his age or service. For purposes of paragraph (b)(1)(ii)(B) of this section, participation commences on the first day of the first year in which the participant commenced his participation in the plan, except that years which may be disregarded under section 410(a)(5)(D) may be disregarded in determining when participation commenced.

The entire § 1.411(a)-7 was first published as T.D. 7501, 42 F.R. 42329, Aug. 23, 1977.

Subparagraph 7(b)(2) contains illustrations of 7(b)(1); the first of these is squarely in point:

> (2) EXAMPLES. The provisions of this paragraph are illustrated by the following examples:
>
> EXAMPLE (1). Plan A defines normal retirement age as age 65. Under the plan, benefits payable to participants who retire at or after age 60 are not reduced on account of early retirement. For purposes of section 411 and the vesting regulations, normal retirement age under Plan A is age 65 (determined under subparagraph (1)(i) of this paragraph). This is true even if in operation all participants retire at age 60.

Subparagraph (1)(i) referred to in the Regulation follows the ERISA definition, "the time specified by a plan at which a plan participant attains normal retirement age." See n.7, *supra*. Plan A in the example illustrates the 710 Plan. Normal retirement age is defined as age 65. Benefits are paid earlier (at age 57 in the Local 710 Plan; at age 60 in Plan A), but this is irrelevant to the point of the example, which is that for purposes of ERISA's definition and vesting regulations, the "normal retirement age" is age 65.[8]

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[8] This example, which petitioners disregard, also refutes their claim that subparagraph 7(b)(1) supports *their* position (Pet. 11). Moreover the sentence from which the petitioners quote is, even on its face, inapplicable here because it applies only "if an age is not specified by a plan as the normal retirement age," whereas the respondent Plan *does* specify an age (65) as the "normal retirement age."

The I.R.S. official's letter quoted at Pet. 10 likewise does not purport to deal with plans which have defined the "normal retirement age." And even if the letter could be read to support petitioners, this Court does not sit to review conflicts between a Court of Appeals and an I.R.S. official—least of all where that court's decision accords with a Treasury Regulation.

Petitioners deem it necessary to invoke Rev. Rul. 71-147, 1971-1 C.B. 116 (Pet. 9-11) which antedated ERISA, without acknowledging that it was "modified" in Rev. Rul. 78-120, 1978-1 C.B. 117 and

In sum, petitioners' argument that the courts below misconstrued the statutory definition of "normal retirement age" as applied to this plan is baseless.[9]

B. In the argument supporting their second question presented (Pet. 15-18), petitioners fail to identify expressly which subsection of 29 U.S.C. § 1054 (b) (1) (D) and 26 U.S.C. § 411(b) (1) (D) is the basis of their claim. It appears, however, that their reliance is on subsection (i) which refers to the participants' "accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974." The Court of Appeals determined that subsection (i) was not applicable because "it is undisputed that the prior Plan did not specify any formula" and that subsection (ii) therefore governs.[10]

Petitioners say: "The Court sought an ERISA-style ratable formula in the pre-ERISA plan, and of course, found none." (Pet. 17) The Court found none because there was none. That should be the end of the matter.

"superseded" by Rev. Rul. 80-276, 1980-2 C.B. 131. The passage from Rev. Rul. 78-120 quoted at Pet. 10 merely describes the pension plan concerning which advice was given therein. That plan provided for a normal retirement age of less than 65. Approval of such a plan obviously does not imply *disapproval* of plans, like the Local 710 plan, which provide for a "normal retirement age" of 65.

[9] Petitioners' further point, that the Plan amendment which they challenge was untimely (Pet. 14), was not presented to the District Court. The Court of Appeals, without deciding whether the issue was properly before it, rejected it on the merits. (Pet. 30a-31a.) Petitioners' afterthought plainly lacks general importance and is wholly undeserving of this Court's attention. Indeed, (as defendants advised the Court of Appeals at their first opportunity) the amendment was adopted pursuant to a "Special Reliance Procedure" promulgated by I.R.S. *See* Technical Information Releases 1415 and 1416, Prentice-Hall, *Pension and Profit Sharing* ¶¶ 107,117 and 107,118.

[10] Petitioners have never contended that the Plan fails to satisfy the requirements of (ii).

It is difficult to imagine an issue less worthy of review by this Court than whether a Court of Appeals erred in determining that a particular "pre-ERISA plan did not specify an accrued benefit formula." (Pet. 17) Moreover, although their entire argument, such as it is, depends on the existence in the pre-ERISA plan of the equivalent of an accrued benefit formula", petitioners never describe what that "equivalent" was. Nor can they, since their own description (Pet. 15-16) acknowledges that the benefits payable to participants with 20 years service varied depending on the participant's age at retirement. It is for this reason that petitioners find it necessary to disown (Pet. 16) the District Court's "implicit accrual" formula (Pet. 4a, 10a) which assumed retirement after age 57 (see Pet. 32.).

Petitioners' argument is baseless also because ERISA simply does not recognize "the equivalent of an accrued benefit formula" (Pet. 17); that is a construct fabricated by petitioners for the purpose of this case. Subsection (ii) was added precisely because some plans had no benefit accrual formula, although many others did. The latter were governed by what is now subsection (i), whose terms were in the Bill from the beginning. Subsection (ii) was first adopted by the House-Senate conferees, in response to the staff's comment: "The conferees may wish to clarify whether a plan should be required to accrue benefits for service prior to the effective date, even though it has no accrual formula for this period."[11] To provide for vesting of pre-ERISA years without prescribing the amount that would vest in at least 23% of the plans affected would have rendered the newly adopted vesting provisions virtually meaningless. Accordingly, the conferees added what is now subparagraph (ii).[12]

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[11] III Legislative History of the Employee Retirement Income Security Act of 1974 (G.P.O. 1976), p. 5167 (hereafter "ERISA Leg. Hist.").

[12] See the discussion in III ERISA Leg. Hist. p. 4542.

Every pre-ERISA pension plan paid a benefit after certain age, years of service and other eligibility requirements were met. This fact alone establishes that if the legal "equivalent of an accrued benefit formula" (Pet. 17) had existed under such pre-ERISA plans, it would not have been necessary for Congress to add subsection (ii). The Court of Appeals correctly recognized that the petitioners' argument renders (ii) superfluous. (Pet. 32a) The Petition does not even confront, let alone refute, that reasoning.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari in No. 82-37 should be denied.

Respectfully submitted,

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APPENDIX

SECTION 3.10: VESTED PENSION—AMOUNT

The amount of the monthly Vested Pension is the sum of the Accrued Pension earned during each Period of Accrual based on the Pension Credits earned during each Period of Accrual and the Normal Retirement Pension in effect at the date of termination from Covered Employment during the Period of Accrual with the Accrued Pension computed, as follows:

[a] 1½% of the Normal Retirement Pension in effect when the Participant terminates Covered Employment during the Period of Accrual for each year and fraction thereof of Pension Credits earned during the Period of Accrual and earned prior to January 1, 1976; plus

[b] 3%of the amount determined in [a] for each year and fraction thereof of Pension Credits earned during the Period of Accrual and earned after January 1, 1976; plus

[c] 3% of such Normal Retirement Pension for each year and fraction thereof of Pension Credits earned during the Period of Accrual and earned after January 1, 1976.

Period of Accrual means the period of time during which the Participant earns Future Pension Credits based on his work in Covered Employment and ends on the day before the beginning of any period during which the Participant is out of Covered Employment for more than 156 consecutive calendar weeks.

In any event the monthly amount of the Accrued Pension shall not be less than $250.00 for those Participants who were in Covered Employment prior to February 1, 1976, and have at least 20 years of Pension Credits.

If a Participant elects to receive the Vested Pension before his Normal Retirement Date, the amount of such

Vested Pension will be reduced in the same manner as provided in Section 3.08[a] for Early Retirement Pension.

If a Participant makes this election, the Commencement Date of such Vested Pension will be the first day of the month following the month in which the Participant has fulfilled all the conditions for entitlement to benefits, including the filing of an application with the Controller.

It shall be the responsibility of such separated Participant to keep the Controller informed as to his address and the Controller and Trustees shall have no obligation to seek out the Participant other than sending all forms, notices, payments or other materials to the Participant's last known address.